SUPREME COURT, U.S.
OCT 10 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-129

TAUB, HUMMEL & SCHNALL, INC.,

Petitioner,

-against-

I. C. HERMAN & CO., INC.,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

HENRY CREIDY
Attorney for Petitioner
Office & P. O. Address
475 Fifth Avenue
New York, New York 10017
Telephone: (212) LE 2-3834

Appeal Reproductions Inc., 217 Broadway, New York, N.Y. 10007
Tel: 233-6626

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ARGUMENT

(1)

We have read the respondent-appellee's brief in opposition to our petition for a writ of certiorari and believe that our petition speaks for itself. We

did not wish to burden this Court with further argument.

However,

The respondent-appellee's brief contains a number of incorrect statements which compel us to reply.

(2)

We assure this Court that the effect of an adverse decision on this application is very real to brokers, importers and the Customs service. In fact, the National Customs Brokers & Forwarders Association of America Inc. has already contacted this office about the submission of a brief as amicus curiae should this petition be granted. Similarly the United States Treasury, Bureau of Customs is expected to file a brief in support of our position.

The respondent-appellee in a cavalier fashion seeks to defeat our application by concluding that the issue is unimportant because it arose so infrequently. While we reject such a statement as inaccurate, and we can catalog all of the cases in which such issue arose or is pending if this Court desires, we submit that the importance of the issue cannot be measured by the number of lawsuits. There are now pending similar matters awaiting the results of this case.

The most flagrant inaccuracies occur in the statements contained in the last paragraph on page 3.

Respondent urges that brokers are not prevented from becoming co-sureties on customs bonds. Respondent has not taken the trouble to read the Regulations and Treasury decision we cite, both of which are clear and definite and prohibit such action. If corporate brokers are prohibited from becoming sureties such prohibition applies to co-sureties as well.

Respondent suggests assignment from the surety as a solution. This is never done in the industry. The surety companies never assign their rights because they continue to be bound to the government since the bond is on-going, and they would be jeopardizing their rights as to future demands by the government on the bonds.

Respondent further suggests that assignments are recognized under 31 U.S.C. 193 dealing with subrogation in favor of sureties. This suggestion overlooks two problems; the first - 31 U.S.C. 193 does not apply as we have argued in our petition; the second - the statute in speaking of assignee was referring to successor sureties, not third party assignees.

Respondent admonishes the custom brokers to deal only with financially sound importers. Such argument merely begs the issue. In fact the importer in this case was outwardly sound on Friday and bankrupt on Monday. Furthermore, consider what would happen in business and industry if only AAA accounts were served.

(3)

On page 4 respondent argues that 11 U.S.C.A. 104(a)(4) only accords priority to taxes "due and owing". While we do not concede that the words "due and owing" are the criteria, had respondent read further, the following subsection (5) would demolish respondent's argument.

The respondent overlooks our contention that petitioner is entitled to equitable subrogation.

CONCLUSION

FOR ALL THE REASONS STATED IN THE PETITION AND HEREIN A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

Respectfully submitted,

HENRY CREIDY
Attorney for Petitioner